

LAWYERS FOR  
CLEAN WATER INC

November 2, 2017

Xavier Becerra  
California Attorney General  
Office of the Attorney General  
1300 "I" Street  
Sacramento, California 95814-2919

Via U.S. Mail

**Re: Furnishing copy of Verified Petition for Writ of Mandate (C.C.P. § 388)**

To whom it may concern:

As required by Code of Civil Procedure section 388, please find enclosed a copy of the Verified Petition for Writ of Mandate filed by Santa Barbara Channelkeeper on November 2, 2017, in the Superior Court in San Francisco County.

The petition seeks an order compelling the State Water Resources Control Board (State Board) to continue to identify Reaches 3 and 4 of the Ventura River as impaired waterways in California's 2014/2016 Integrated Report as required by sections 303(d) and 305(b) of the Federal Water Pollution Control Act (Clean Water Act); and/or an order compelling the State Board to rely on all readily available data, including the information gathered pursuant to section 305(b) of the Clean Water Act, before making any impairment listing decisions about Reaches 3 and 4 of the Ventura River in California's 2014/2016 Integrated Report.

Sincerely yours,



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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN FRANCISCO

SANTA BARBARA CHANNELKEEPER a  
California non-profit corporation,

Petitioner,

v.

STATE WATER RESOURCES CONTROL  
BOARD, a California State Agency,  
Respondent.

) Case No.

) **VERIFIED PETITION FOR WRIT OF  
MANDATE**

) Code of Civil Procedure § 1084 *et seq.*, Water  
) Code § 13330

1 **I. Introduction**

2 1. Reaches 3 and 4 of the Ventura River cannot support their designated beneficial uses due  
3 to excessive water diversions and over pumping. Accordingly, for the past nineteen years the State  
4 Water Resources Control State Board (State Board or SWRCB) has identified Reaches 3 and 4 of the  
5 Ventura River on the State's list of impaired waterways. However, on October 3, 2017, when the State  
6 Board adopted California's "2014/2016 Integrated Report" pursuant to sections 303(d) and 305(b) of the  
7 Federal Water Pollution Control Act (Clean Water Act), the State Board illegally delisted and illegally  
8 failed to otherwise properly categorize Reaches 3 and 4 of the Ventura River though the impairments  
9 persist.

10 2. Santa Barbara Channelkeeper (Channelkeeper, SBCK, or Petitioner) hereby petitions this  
11 Court for a Writ of Mandate pursuant to California Code of Civil Procedure section 1094.5:

12 a. Enjoining the State Board from delisting Reaches 3 and 4 of the Ventura River from  
13 California's 2014/2016 Integrated Report in compliance with section 303(d) of the Clean Water Act;

14 b. Compelling the State Board to identify Reaches 3 and 4 of the Ventura River on  
15 California's 2014/2016 Integrated Report as required by section 305(b) of the Clean Water Act; and

16 c. Compelling the State Board to rely on all readily available data, including the  
17 information gathered pursuant to section 305(b) of the Clean Water Act, before making any listing  
18 decisions about Reaches 3 and 4 of the Ventura River in California's 2014/2016 Integrated Report.

19 **II. The Parties**

20 **A. Santa Barbara Channelkeeper**

21 3. Channelkeeper is a non-profit public benefit corporation organized under the laws of the  
22 State of California and headquartered in Santa Barbara, California.

23 4. Channelkeeper's office is located at 714 Bond Avenue, Santa Barbara, California 93103.

24 5. Channelkeeper's mission is to protect and restore the Santa Barbara Channel and its  
25 tributaries for the benefit of its ecosystems and the surrounding human communities. Channelkeeper  
26 accomplishes its mission through science-based advocacy, education, field work, and enforcement of  
27 environmental laws. Because the Ventura River is one of the largest rivers that empties into the Santa  
28 Barbara Channel, it is a major focus of SBCK's work.

1           6.       SBCK has served as a lead advocate, community organizer, educator, scientist, and  
2 monitor in the Ventura River watershed for 15 years. Via the “Ventura River Stream Team” citizen  
3 water quality monitoring program, Channelkeeper has trained and engaged more than 600 volunteers  
4 and collected 17 years of scientifically sound data characterizing water quality in the Ventura River and  
5 its tributaries. This data has been used extensively by various agencies to guide their pollution  
6 prevention and clean-up programs. In addition to this monitoring effort, SBCK has also served as the  
7 lead environmental advocate on a variety of priority issues throughout the watershed for many years.  
8 Channelkeeper and its members have surveyed nearly every mile of the Ventura River and its major  
9 tributaries, identifying and mapping water quality and habitat impairments. Channelkeeper served as the  
10 primary (and in many cases sole) stakeholder representing environmental interests in critical and  
11 technically complex environmental regulatory processes such as the Total Maximum Daily Loads  
12 (TMDL) for the Ventura River’s impairments.

13           7.       Thus, the interests of SBCK and its members have been, are being, and will continue to  
14 be adversely affected by the State Board’s failure to comply with the requirements of the Clean Water  
15 Act described herein. The relief sought herein will redress the harms to SBCK caused by the State  
16 Board’s prejudicial abuse of discretion. Continuing commission of the abuses of discretion alleged  
17 herein will irreparably harm SBCK’s members, for which harm they have no plain, speedy or adequate  
18 remedy at law.

19           **B.   The State Board**

20           8.       The State Board is now, and at all times mentioned in this complaint and petition has  
21 been, a state agency under the laws of the State of California. (*See* Water Code § 174 *et seq.*; *see also*  
22 Water Code § 13100.)

23           9.       The State Board is required to coordinate consideration of water rights, water quality, and  
24 safe and reliable drinking water. (Water Code § 174(b).)

25           10.      The State Board is responsible for carrying out the requirements of sections 303(d) and  
26 305(b) of the Clean Water Act. (*See* 33 U.S.C. §§ 1313, 1315; 40 C.F.R. §§ 130.7, 130.8.)

27           11.      For purposes of Division 7 of the Water Code, California is divided into nine regions,  
28 including the Los Angeles Region which comprises all basins draining into the Pacific Ocean between



1 the southeasterly boundary, located in the westerly part of Ventura County, of the watershed of Rincon  
2 Creek and a line which coincides with the southeasterly boundary of Los Angeles County from the  
3 ocean to San Antonio Peak and follows thence the divide between San Gabriel River and Lytle Creek  
4 drainages to the divide between Sheep Creek and San Gabriel River drainages. (Water Code § 13200.)  
5 These regional water quality control boards (RWQCBs) are required to coordinate with the State Board  
6 and other RWQCBs, as well as other state agencies with responsibility for water quality, with respect to  
7 water quality control matters. (Water Code § 13225(a).)

### 8 **III. Jurisdiction and Venue**

9 12. This Court has jurisdiction over this action pursuant to Code of Civil Procedure section  
10 1094.5 and Water Code section 13330.

11 13. Venue is proper in this Court pursuant Code of Civil Procedure sections 395 and 401, as  
12 the Attorney General maintains an office in San Francisco County.

13 14. Under Water Code section 13330(a), this action is properly before this Court, as it is filed  
14 not later than 30-days from the date the State Board made California's final 2014/2016 Integrated  
15 Report publicly available.

### 16 **IV. Regulatory Background**

#### 17 **A. The Clean Water Act's Purpose and Effluent Limitation Requirements**

18 15. The Clean Water Act "is a comprehensive water quality statute designed to 'restore and  
19 maintain the chemical, physical, and biological integrity of the Nation's waters.'" (*PUD No. 1 of*  
20 *Jefferson County v. Wash. Dep't of Ecology* (1994) 511 U.S. 700, 704 (quoting 33 U.S.C. § 1251(a).)  
21 The distinction between water quality and quantity under the Clean Water Act is "artificial." (*PUD*  
22 *No. 1*, 511 U.S. at 701.)

23 16. To achieve this purpose, the Clean Water Act requires, among other things, that two  
24 types of effluent limitations be established: technology-based effluent limitations and water-quality  
25 based effluent limitations. (*See* 33 U.S.C. § 1311.)

26 17. When technology-based effluent limitations prove insufficient to adequately protect  
27 water quality, water-quality based effluent limitations meant to achieve "water quality standards"  
28 established by each state in coordination with the Environmental Protection Agency (EPA), including

1 California, apply. (*See* 33 U.S.C. §§ 1311(b)(1)(C), 1313(a).) Water quality standards consist of:

2 (1) designated beneficial uses, (2) water quality criteria sufficient to protect the designated uses, and  
3 (3) an antidegradation policy to prevent clean waters from slipping below applicable standards. (*See* 40  
4 C.F.R. § 130.2(d).)

5 18. Categories of designated beneficial uses include: (1) aquaculture, raising fish or other  
6 aquatic organisms not for release to other waters; (2) domestic, water used by homes, resorts, or  
7 campgrounds, including water for household animals, lawns, and shrubs; (3) fire protection, water to  
8 extinguish fires; (4) fish and wildlife, enhancement of fish and wildlife resources, including raising fish  
9 or other organisms for scientific study or release to other waters of the state; (5) frost protection,  
10 sprinkling to protect crops from frost damage; (6) heat control, sprinkling to protect crops from heat;  
11 (7) industrial use, water needs of commerce, trade, or industry; (8) irrigation, agricultural water needs;  
12 (9) mining, hydraulicking, drilling and concentrator table use; (10) municipal, city and town water  
13 supplies; (11) power, generating hydroelectric and hydromechanical power; (12) recreation, boating,  
14 swimming, and fishing; (13) stock watering, commercial livestock water needs; and (14) water quality  
15 control, protecting and improving waters that are put to beneficial use. (*See* Water Code §§ 100, 106,  
16 1004, 1005.1, 1005.2, 1005.4, 1010, 1011, 1011.5, 1012, 1017, 1242, 1242.5, 1243, 1243.5, and  
17 13050(f); *see also* Water Quality Control Plan for the Los Angeles Region (Basin Plan), Chpt. 2.)

18 19. Water quality objectives are numeric or narrative water quality standards that must be  
19 attained or maintained in order to protect the designated beneficial uses of a water body. (*See* 33 U.S.C.  
20 §§ 1312, 1313(a).)

21 **B. Section 303(d) of the Clean Water Act**

22 20. Section 303(d) of the Clean Water Act requires each state, including California, to  
23 identify waterways within their boundaries where effluent limitations are insufficient to ensure  
24 compliance with water quality standards and that a water body can no longer be put to its designated  
25 beneficial uses. Waterways identified pursuant to section 303(d) are referred to as “impaired waters” or  
26 “water quality limited segments.” (*See* 40 C.F.R. § 130.2(j) (defining “water quality limited  
27 segments”).) And the compilation of information required by section 303(d) is commonly referred to as  
28 the “303(d) list.”

1           21.     In particular, “[e]ach State *shall identify those waters within its boundaries* for which  
2 the effluent limitations ... are not stringent enough to implement any water quality standard applicable  
3 to such waters. The State shall establish a priority ranking for such waters, taking into account the  
4 severity of the *pollution* and the uses to be made of such waters.” (33 U.S.C. § 1313(d)(1)(A) (emphasis  
5 added); *see also Pronsolino v. Nastri* (9th Cir. 2002) 291 F.3d 1123, 1127.) Priority ranking under  
6 section 303(d)(1)(A) includes consideration of a state’s 305(b) report. (*See* 43 Fed.Reg. 60662, 60666.)

7           22.     In addition, “[e]ach State *shall identify those waters or parts thereof within its*  
8 *boundaries* for which controls on thermal discharges under section 301 ... are not stringent enough to  
9 assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.”  
10 (33 U.S.C. § 1313(d)(1)(B) (emphasis added).)

11           23.     Pursuant to section 303(d)(1)(C), each state must “establish for the waters identified in  
12 [section 303(d)(1)(A)], and in accordance with the priority ranking, the total maximum daily load, for  
13 those pollutants which the Administrator [of the EPA] identifies ... as suitable for such calculation.” (33  
14 U.S.C. § 1313(d)(1)(C).) On December 28, 1978, the EPA identified all pollutants as suitable for the  
15 calculation of total maximum daily loads under the proper technical conditions. (*See* 43 Fed.Reg. 60662,  
16 60665.)

17           24.     “Each State shall submit to the Administrator from time to time, with the first such  
18 submission not later than one hundred and eighty days after the date of publication of the first  
19 identification of pollutants under section 304(a)(2)(D)..., for his approval *the waters identified* and the  
20 loads established under [303(d)(1)(A), 303(d)(1)(B), 303(d)(1)(C), and 303(d)(1)(D)].” (33 U.S.C.  
21 § 1313(d)(2) (emphasis added).) As explained by EPA, to comply with the requirements of section  
22 303(d)(2) states must submit: “[a]n identification of waters for which effluent limitations ... are not  
23 stringent enough to implement applicable water quality standards. This requirement can be satisfied by  
24 referencing documents already submitted to EPA, e.g., section 305(b) reports. ...” (43 Fed.Reg. 60662,  
25 60666.)

26           25.     Regulations implementing section 303(d)(2) require each state, including California, to  
27 submit their 303(d) list by April 1 of every even numbered year. (40 C.F.R. § 130.7(d)(1); *see also*  
28 *Anacostia Riverkeeper, Inc. v. Jackson* (D.D.C. 2011) 798 F.Supp.2d 210, 215.)

1           26.     “For the specific purpose of developing information, each State shall identify all waters  
2 within its boundaries which it has not identified [under section 303(d)(1)(A) and 303(d)(1)(B)] ...and  
3 estimate for such waters the total maximum daily load with seasonal variations and margins of safety,  
4 for those pollutants which the Administrator identifies ... as suitable for such calculation and for thermal  
5 discharges, at a level that would assure protection and propagation of a balanced indigenous population  
6 of fish, shellfish and wildlife.” (33 U.S.C. § 1313(d)(3).) With respect to section 303(d)(3), EPA  
7 explained that “[w]hile States should identify all water segments within their boundaries, TMDL’s need  
8 be *calculated* only for pollutants for which the segments are water quality limited.” (43 Fed.Reg. 60662,  
9 60663 (emphasis original).)

10           27.     “Each State shall assemble and evaluate *all* existing and readily available water quality-  
11 related data and information to develop” the 303(d) list. (40 C.F.R. § 130.7(b)(5) (emphasis added).) “At  
12 a minimum ‘all existing and readily available water quality-related data and information’ includes but is  
13 not limited to all of the existing and readily available data and information about the following  
14 categories of waters: Waters identified by the State in its *most recent section 305(b) report* as ‘partially  
15 meeting’ or ‘not meeting’ designated uses or as ‘threatened’;... .” (*Id.* (emphasis added); *see also* 2002  
16 Integrated Water Quality Monitoring and Assessment Report Guidance, p. 5, Env’tl Prot. Agency, Nov.  
17 19, 2001 (citing reports of water quality problems provided by local, state, territorial or federal agencies,  
18 volunteer monitoring networks, members of the public or academic institutions as existing and readily  
19 available data).)

20           **C. Section 305(b) of the Clean Water Act**

21           28.     Section 305(b) of the Clean Water Act requires each state, including California, to report  
22 to EPA on the water quality of all navigable waters of the state on a biannual basis. This report is  
23 commonly referred to as the “305(b) report.”

24           29.     The 305(b) report is broader than the 303(d) list, as “[e]ach State *shall* prepare and  
25 submit to the Administrator by April 1, 1975, and shall bring up to date by April 1, 1976, and *biennially*  
26 thereafter, a report which *shall* include-- a description of *the water quality of all navigable waters* in  
27 such State during the preceding year, with appropriate supplemental descriptions as shall be required to  
28 take into account seasonal, tidal, and other variations, correlated with the quality of water required by

1 the objective of this Act ...; an analysis of the extent to which *all navigable waters* of such State provide  
2 for the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow  
3 recreational activities in and on the water; an analysis of the extent to which the elimination of the  
4 discharge of pollutants *and* a level of water quality which provides for the protection and propagation of  
5 a balanced population of shellfish, fish, and wildlife and allows recreational activities in and on the  
6 water, have been or will be achieved by the requirements of this Act ..., together with recommendations  
7 as to additional action necessary to achieve such objectives and for what waters such additional action is  
8 necessary; an estimate of (i) the environmental impact, (ii) the economic and social costs necessary to  
9 achieve the objective of this Act ... in such State, (iii) the economic and social benefits of such  
10 achievement, and (iv) an estimate of the date of such achievement; and a description of the nature and  
11 extent of nonpoint sources of pollutants, and recommendations as to the programs which must be  
12 undertaken to control each category of such sources, including an estimate of the costs of implementing  
13 such programs.” (33 U.S.C. § 1315(b) (emphasis added); *see also* 40 C.F.R. § 130.8(b).)

14 30. As EPA has stated, “Section 305(b) of the CWA requires that *all waters* be assessed  
15 every two years.” (2002 Integrated Water Quality Monitoring and Assessment Report Guidance, p. 2,  
16 Env’tl Prot. Agency, Nov. 19, 2001 (emphasis added).)

17 31. A state’s section 305(b) report “serves as the primary assessment of State water quality.  
18 Based upon the water quality data and problems identified in the 305(b) report, States develop water  
19 quality management (WQM) plan elements to help direct all subsequent control activities. Water quality  
20 problems identified in the 305(b) report should be analyzed through water quality management planning  
21 leading to the development of alternative controls and procedures for problems identified in the latest  
22 305(b) report.” (40 C.F.R. § 130.8(a).)

23 32. A state, including California, must review the 305(b) report in developing the 303(d) list.  
24 (*See* 40 C.F.R. § 130.7(b)(5).)

#### 25 **D. Integrated Reports and EPA Categories**

26 33. Beginning with the 303(d) lists and 305(b) reports that were due in 2002, EPA Guidance  
27 instructs that states submit “Integrated Reports” that include information required by both statutory  
28 sections. (*See* 2002 Integrated Water Quality Monitoring and Assessment Report Guidance, p. 1, Env’tl

1 Prot. Agency, Nov. 19, 2001 (“For the first time, [EPA] is providing states, territories, and authorized  
2 tribes with guidance for integrating the development and submission of 2002 305(b) water quality  
3 reports and Section 303(d) lists of impaired waters.”); *see also* 2005 Guidance for 2006 Assessment,  
4 Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water  
5 Act, Env’tl Prot. Agency, July 29, 2005).)

6 34. EPA identifies categories into which states should place waterways identified in  
7 Integrated Reports: Category 1, Category 2, Category 3, Category 4A, Category 4B, Category 4C, and  
8 Category 5. (*See* 2002 Integrated Water Quality Monitoring and Assessment Report Guidance, pp. 5-7,  
9 Env’tl Prot. Agency, Nov. 19, 2001.)

10 35. EPA’s guidance is that assessment categories are not mutually exclusive, and waters may  
11 be placed in more than one category (for example, Categories 4C and 5). In particular, EPA instructs,  
12 “States should assign all of their surface water segments to *one or more* of the five reporting categories  
13 presented in Section V of this guidance.” (2005 Guidance for 2006 Assessment, Listing and Reporting  
14 Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act, p. 19, Env’tl Prot.  
15 Agency, July 29, 2005 (emphasis added); *see also* 2015 Information Concerning 2016 Clean Water Act  
16 Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions, p. 15, Env’tl Prot. Agency,  
17 August 13, 2005).)

18 36. Waters should be listed in Category 4C “if the impairment is not caused by a pollutant.”  
19 (*See* 2002 Integrated Water Quality Monitoring and Assessment Report Guidance, p. 7, Env’tl Prot.  
20 Agency, Nov. 19, 2001; *see also* 2005 Guidance for 2006 Assessment, Listing and Reporting  
21 Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act, p. 56, Env’tl Prot.  
22 Agency, July 29, 2005 (“Examples of circumstances where an impaired segment may be placed in  
23 Category 4c include segments impaired solely due to lack of adequate flow or to stream  
24 channelization.”).) “Data or information based on visual observations of no water in a perennial stream  
25 would be information on the physical condition of the stream, and would demonstrate the aquatic life or  
26 recreational use is most likely not being attained and a State may conclude that the designated use is  
27 impaired.” (2015 Information Concerning 2016 Clean Water Act Sections 303(d), 305(b), and 314  
28 Integrated Reporting and Listing Decisions, p. 14, Env’tl Prot. Agency, August 13, 2005; *see also* Draft



1 EPA-USGS Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration, Ch. 5,  
2 February 2016 (“EPA recommends reporting impairments due to hydrologic alteration in Category 4c,  
3 which are those impairments due to pollution not requiring a TMDL”).

4 37. “EPA encourages States to evaluate all existing and readily available data and/or  
5 information when determining the attainment status of a water. Thus, data and/or information  
6 documenting significant hydrologic or habitat alteration could be used to make a use attainment decision  
7 for an impairment due to pollution not caused by a pollutant and should be collected, evaluated, and  
8 reported as appropriate.” (2015 Information Concerning 2016 Clean Water Act Sections 303(d), 305(b),  
9 and 314 Integrated Reporting and Listing Decisions, p. 14, Env’tl Prot. Agency, August 13, 2005.)

10 38. Category 5 “constitutes the section 303(d) list that EPA will review and approve or  
11 disapprove pursuant to 40 CFR 130.7. States must include on their section 303(d) list those waters  
12 required to be listed by the Clean Water Act and EPA’s implementing regulations. Segments must be  
13 placed in Category 5 when, based on existing and readily available data and/or information, technology-  
14 based effluent limitations required by the Act, more stringent effluent limitations, and other pollution  
15 control requirements are not sufficient to implement an applicable water quality standard and a TMDL is  
16 needed. 40 CFR 130.7(b)(1).” (2005 Guidance for 2006 Assessment, Listing and Reporting  
17 Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act, p. 57, Env’tl Prot.  
18 Agency, July 29, 2005.)

19 39. “A segment that is included in Category 5 may also be included in other categories where  
20 appropriate.” (2005 Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to  
21 Sections 303(d), 305(b) and 314 of the Clean Water Act, p. 57, Env’tl Prot. Agency, July 29, 2005.)  
22 “Category 5 takes precedence if the state chooses to list a segment in only one category.” (*Id.*)

23 40. In an Integrated Report “[a] state or territory should provide the public an opportunity to  
24 review and comment on *an integrated assessment of the status of all waters within its jurisdiction*.  
25 This integrated assessment will include monitoring schedules, the assessment and listing methodology,  
26 and supporting data and information used to develop the Integrated Report.” (*See* 2002 Integrated Water  
27 Quality Monitoring and Assessment Report Guidance, p. 3, Env’tl Prot. Agency, Nov. 19, 2001.)

28 41. “In order to provide states and territories with the necessary time to integrate the

requirements of Sections 305(b) and 303(d), EPA has extended the date for the submission of 303(d) lists of [water quality assessment units (“AUs”)] still requiring the establishment of a TMDL to October 1, 2002.” (See 2002 Integrated Water Quality Monitoring and Assessment Report Guidance, p. 4, Env’t Prot. Agency, Nov. 19, 2001.) No other extensions have been granted to for submission of the Integrated Report.

42. “States and territories must provide a description of the assessment and listing methodology used to develop their Section 303(d) lists and Section 305(b) reports. This methodology should include a description of the processes and procedures used to assess the quality of the waters and explain how all existing and readily available data and information was assembled and used to determine the attainment status in each AU, consistent with the applicable water quality standards.” (See 2002 Integrated Water Quality Monitoring and Assessment Report Guidance, p. 5, Env’t Prot. Agency, Nov. 19, 2001.) An “AU” is “[a] waterbody whose attainment status is reported in the Integrated Report.” (See 2002 Integrated Water Quality Monitoring and Assessment Report Guidance, p. 4, Env’t Prot. Agency, Nov. 19, 2001.)

43. Further, in an Integrated Report states “should report all of the pollutants or other types of pollution for impaired or threatened AUs,” and “document and report any observed effects of pollution for each AU-designated use combination.” (See 2002 Integrated Water Quality Monitoring and Assessment Report Guidance, Appendix B pp. 6-7, Env’t Prot. Agency, Nov. 19, 2001.) “Observed effects may include; fish lesions, fish kills, stream bottom deposits, low combined biota/habitat bioassessment.” (See 2002 Integrated Water Quality Monitoring and Assessment Report Guidance, Appendix B p. 7, Env’t Prot. Agency, Nov. 19, 2001.)

#### **E. The State Board’s Listing Policy**

44. The State Board adopted a “Water Quality Control Policy for Developing California’s Clean Water Act Section 303(d) List” on September 30, 2004, revisions to which were approved on May 15, 2015 (Listing Policy). The objective of Listing Policy is to establish a standardized approach for developing California’s section 303(d) list in order to achieve the overall goal of achieving water quality standards and maintaining beneficial uses in all of California’s surface waters.

45. The Listing Policy describes the process by which the State Board and RWQCBs will



1 comply with the listing and delisting requirements of section 303(d).

2 46. Section 3 of the Listing policy provides the methodology for adding or maintaining  
3 waters on California's 303(d) list.

4 47. Section 3.2 of the Listing Policy states that "using a binomial distribution, waters shall be  
5 placed on the 303(d) list if the number of measured exceedances supports rejection of the null  
6 hypothesis," as provided in Table 3.2 of the Listing Policy. (*See Listing Policy, p. 4.*) "When continuous  
7 monitoring data are available, the seven-day average of daily minimum measurements shall be  
8 assessed." (*See Listing Policy, p. 4.*)

9 48. Section 3.9 of the Listing Policy states that "[a] water segment shall be placed on the  
10 section 303(d) list if the water segment exhibits significant degradation in biological populations and/or  
11 communities as compared to reference site(s) and is associated with water or sediment concentrations of  
12 pollutants including but not limited to chemical concentrations, temperature, dissolved oxygen, and  
13 trash." (*Listing Policy, p. 7.*)

14 49. The situation-specific weight of evidence listing factor set out in Section 3.11 of the  
15 Listing Policy provides that when information indicates non-attainment of applicable water quality  
16 standards that the water quality standard is not attained. (*See Listing Policy, p. 8.*) A situation specific  
17 weight of evidence impairment determination is to be justified by: (1) data or information including  
18 current conditions supporting the decision, (2) description of how that data or information affords a  
19 substantial basis in fact from which the impairment decision can be reasonably inferred, (3)  
20 demonstration that the weight of the evidence of the data and information indicate that the water quality  
21 standard is not attained, and (4) demonstration that the approach used is scientifically defensible and  
22 reproducible. (*See Listing Policy, p. 8.*)

23 50. Section 4 of the Listing Policy provides the methodology for removing waters from  
24 California's 303(d) list.

25 51. The Listing Policy provides that the 303(d) list only covers impairments by "pollutants."  
26 But it also provides that RWQCBs fact sheets supporting section 303(d) listings "shall contain . . .  
27 [p]ollutant or type of pollution that appears to be responsible for standards exceedance."

28 52. The Listing Policy does not govern the development of the 305(b) report.

53. A formal “listing policy” or guidance are not perquisites to the State Board’s identification of waterways on the 303(d) list or the 305(b) report for California.

## **V. Facts and Procedural Background**

### **A. The Ventura River Watershed**

54. The Ventura River Watershed is located in the northwestern portion of Ventura County with a small portion in the southeastern portion of Santa Barbara County. The watershed drains a fan-shaped area of about 220 square miles with an elevation from 6,000 feet to sea level.

55. The River has several major tributaries, including Matilija Creek, North Fork Matilija Creek, San Antonio Creek, Coyote Creek, and Cañada Larga.

56. The Basin Plan describes the Ventura River as consisting of five reaches, which, upstream from the Pacific Ocean, are: Reach 1 (Ventura River Estuary to Main Street), Reach 2 (Main Street to Weldon Canyon), Reach 3 (Weldon Canyon to Casitas Vista Road), Reach 4 (Casitas Vista Road to Camino Cielo Road), and Reach 5 (above Camino Cielo Road).

57. There are two major dams, Matilija and Casitas; a river diversion, Robles Diversion Facility; and a subsurface diversion, Foster Park Subsurface Diversion, on the River.

58. Flow in the Ventura River varies seasonally due to a Mediterranean climate pattern of wet cool winters from November through March and dry warm summers from April through October. High flows predominate during the rainy season, starting in winter through early spring.

59. Between October 2000 and October 2008 peak flows in Reaches 3 and 4 occurred after winter storm events and the flows declined to very low levels, less than 1 cubic foot per second (cfs), during the summer dry season. This dry pattern was mitigated in the lower Ventura River, Reaches 1 and 2, by effluent from the Ojai Valley Waste Water Treatment Plant, which constitutes a majority or, at times, all of the flow in this section of the river during the summer and fall of dry years.

60. There is hydraulic communication between surface and groundwater in the Ventura River, and there is significant contribution of groundwater pumping to dewatering of the River.

61. In addition to natural variations in flow, based on annual rainfall, flow regimes in the Ventura River have been altered to support water supply and allow for municipal development, including by the City of San Buenaventura (City).

1           62.     Flow in any particular reach of the River is additionally affected by the status of the  
2 underlying groundwater basin (whether full, filling, or emptying), the occurrence of natural recharge  
3 areas where surface flows will disappear at times, flow between groundwater basins, and the amount of  
4 surface or groundwater withdrawals for municipal, domestic, or agricultural uses.

5           63.     Flows in the Ventura River are naturally perennial, due to the geology of the bedrock  
6 formation beneath the river facilitating groundwater from the aquifer to rise, and partially because of the  
7 Foster Park subsurface dam.

8           64.     The flow in the river is disrupted at Foster Park (which overlies the Upper Ventura River  
9 Groundwater Basin) due to subsurface diversions and groundwater extraction.

10          65.     The Ventura River watershed is home to at least 11 endangered or threatened species,  
11 including southern California steelhead trout, arroyo toad, California least tern, California red-legged  
12 frog, Foothill yellow-legged frog, Least Bell's vireo, southwestern willow flycatcher, and western  
13 snowy plover.

14          66.     The designated beneficial uses of Reach 3 of the Ventura River include: municipal and  
15 domestic supply, industrial service supply, agricultural supply, ground water recharge, freshwater  
16 replenishment, warm freshwater habitat, cold freshwater habitat, wildlife habitat, rare, threatened, or  
17 endangered species, migration of aquatic organisms, spawning, reproduction, and/or early development,  
18 wetland habitat, water contact recreation, and non-water contact recreation.

19          67.     The designated beneficial uses of Reach 4 of the Ventura River include: municipal and  
20 domestic supply, industrial service supply, agricultural supply, ground water recharge, freshwater  
21 replenishment, warm freshwater habitat, cold freshwater habitat, wildlife habitat, rare, threatened, or  
22 endangered species, migration of aquatic organisms, spawning, reproduction, and/or early development,  
23 wetland habitat, water contact recreation, and non-water contact recreation.

24           **B.   The Ventura River Is Impaired for Pumping and Diversion and Cannot Support its**  
25           **Beneficial Uses**

26          68.     In 1998, the State Board first identified the designated beneficial uses of Reaches 3 and 4  
27 of the Ventura River as impaired due to water pumping and diversions.

28          69.     On August 4, 2010, the State Board approved California's 2010 303(d) list. The

1 supporting fact sheets state that both the Los Angeles RWQCB and State Board staff reviewed the  
2 existing Ventura River watershed listings for pumping, water diversions, and fish barriers and decided to  
3 make no modifications to the list. On October 11, 2011, the EPA approved the State Board's review and  
4 update to the 303(d) list, which maintained the pumping and diversion impairments for Reaches 3 and 4  
5 of the Ventura River.

6 70. On April 27, 2015, the State Board approved California's 2012 303(d) list. In developing  
7 the 2012 303(d) list the State Board indicated that it was considering delisting Reaches 3 and 4 of the  
8 Ventura River, but did not do so at that time. On June 26, 2015, the EPA partially approved the State  
9 Board's review and update to the 303(d) list, which maintained the pumping and diversion impairments  
10 for Reaches 3 and 4 of the Ventura River, and on July 30, 2015, the EPA issued its final approval of the  
11 2012 303(d) list.

12 71. Currently, 19 years after the initial listings, the designated beneficial uses of Reaches 3  
13 and 4 of the Ventura River remain impaired due to pumping and diversion.

14 72. The data and information Channelkeeper submitted as a "Line of Evidence" to State  
15 Board are included in, but not limited to, paragraphs 73-77, below. Channelkeeper's Line of Evidence  
16 included citations and references to the underlying reports and studies containing, which are readily  
17 accessible and/or already in the State Board's possession, as well as water quality, flow, and diversion  
18 data for the River.

19 73. As surface flows, groundwater, and pumping and diversions are connected, excessive  
20 pumping and diversions resulting in significantly reduced surface flows degrade critical habitat for  
21 endangered steelhead trout and impair additional designated and potential beneficial uses of the River.

22 74. Existing dams and ongoing surface water diversions and groundwater extraction have  
23 been identified by the National Marine Fisheries Service (NMFS) as a "very high threat" to steelhead  
24 recovery in the Ventura River. NMFS also found that diversions from the Ventura River at Foster Park  
25 contribute to the present or threatened destruction, modification, or curtailment of steelhead habitat or  
26 range, and disease and predation of steelhead. NMFS concluded that summer and fall withdrawals from  
27 the Foster Park degrade downstream (Ventura River Reaches 1, 2, and 3) habitat and water quality and  
28 decrease the functional value of these areas as an over-summering area for juvenile steelhead.

1           75. To avoid jeopardizing steelhead existence and destruction or adverse modification of  
2 critical steelhead habitat, NMFS found that flows in the Ventura River at the Foster Park USGS gauge  
3 no. 111185000 should not fall below 11 to 12 cfs. And the City of Ventura's hydrology study from 2013  
4 identified a protective threshold of 2 cfs at the Foster Park USGS gauge based on habitat suitability data.  
5 Major withdrawals take place at Foster Park monthly despite the River being well below recommended  
6 thresholds at the USGS Foster Park Gage and even completely dry in many sections.

7           76. The EPA has found that the effects of pumping and water diversions in these reaches  
8 were correlated with the impairment of aquatic life and cold water habitat beneficial uses due to nutrient  
9 loading and algae growth.

10          77. Monitoring conducted by Channelkeeper in 2013 and 2014 for dissolved oxygen and  
11 temperature demonstrates that reduced flows caused by pumping and diversion from Reaches 3 and 4  
12 contribute to non-attainment of water quality objectives for water quality parameters indicative of low  
13 flows.

14          78. Beneficial uses impaired by pumping and diversions in Reaches 3 and 4 of the Ventura  
15 River include: cold freshwater habitat, wildlife habitat, rare, threatened, or endangered species,  
16 migration of aquatic organisms, spawning, reproduction, and/or early development, wetland habitat,  
17 water contact recreation, and non-water contact recreation.

#### 18           **C. The Ventura River Algae, Eutrophic Conditions and Nutrients TMDL**

19          79. The Ventura River Estuary and the Ventura River (including its tributaries) were  
20 identified on California's 1998, 2002, 2006, 2010, and 2012 303(d) lists<sup>1</sup> as impaired due to algae,  
21 eutrophic conditions, low dissolved oxygen, and nitrogen.

22          80. The identified the cause of the algae and nutrient-related impairments were excessive  
23 loading of nutrients, particularly nitrogen and phosphorus to Ventura River and its tributaries.

24          81. On December 6, 2012, the final "Algae, Eutrophic Conditions, and Nutrients Total  
25 Maximum Daily Loads for Ventura River and Its Tributaries" (Ventura River Algae TMDL) was issued.

26          82. The Ventura River Algae TMDL was developed to address: (1) algae, eutrophic  
27 conditions, and low dissolved oxygen impairments in the Ventura River Estuary, (2) algae and low

28 <sup>1</sup> The State Board did not issue updated and/or revised 303(d) lists in 2000, 2004, or 2008.

1 dissolved oxygen impairments in Reach 1 of the Ventura River, (3) algae and low dissolved oxygen  
2 impairments in Reach 2 of the Ventura River, (4) low dissolved oxygen impairment in Cañada Larga,  
3 (5) low dissolved oxygen impairment in Reach 4 of the Ventura River, and (6) nitrogen and low  
4 dissolved oxygen in San Antonio Creek.

5 83. In the Ventura River Algae TMDL, the Los Angeles RWQCB identified the major  
6 categories of nutrient sources in the Ventura River watershed as: (1) stormwater and dry weather runoff  
7 from storm drains, (2) Ojai Valley wastewater treatment plant discharge, (3) runoff from horse and cattle  
8 facilities, (4) runoff from agricultural areas, (5) runoff from undeveloped natural areas, (6) onsite  
9 wastewater treatment systems (i.e., septic tanks), (7) groundwater discharge, and (8) atmospheric  
10 deposition.

11 84. In the Ventura River Algae TMDL, the Los Angeles RWQCB identified that the critical  
12 condition in the Ventura River watershed occurs in dry season (May 1 to September 30) when flows are  
13 lowest and temperatures highest, creating favorable conditions for algae growth in the River. The critical  
14 condition is the period in which the receiving waterbody is most sensitive to the impacts associated with  
15 the pollutants of concern.

16 85. The Ventura River Algae TMDL establishes the loading capacity and allocations for  
17 nutrients in the Ventura River watershed for the identified sources of the impairments during the critical  
18 condition.

19 86. Via letter dated June 28, 2013, the EPA approved the Ventura River TMDL. In its June  
20 28 letter EPA explained that concurrent with the development and public review of the Ventura River  
21 Algae TMDL, EPA developed proposed TMDLs to address the section 303(d) listings for pumping and  
22 water diversion impairment in Reaches 3 and 4 of the Ventura River. EPA released its draft TMDLs for  
23 public comment on December 10, 2012, held a public hearing on January 14, 2013, and accepted public  
24 comments on the draft TMDLs through January 25, 2013. EPA found that the effects of pumping and  
25 water diversions in these reaches were correlated with the impairment of aquatic life and cold water  
26 habitat beneficial uses due to nutrient loading and algae growth, and EPA's draft TMDLs for Reaches 3  
27 and 4 of the Ventura River proposed to address water quality impairments of designated beneficial uses  
28 that were also addressed by the Ventura River Algae TMDL. And EPA's proposed TMDLs were



1 developed to address water quality impairments caused by nitrogen and phosphorus under current  
2 hydrological conditions. EPA did not attempt to delineate the Ventura River's natural hydrological  
3 conditions, or address other issues related to the pumping and diversion of water in Reaches 3 and 4 of  
4 the Ventura River.

5 87. EPA's draft TMDLs were not adopted. EPA did not establish nitrogen and phosphorus  
6 TMDLs to address the pumping and water diversion impairment listings, and noted that other State and  
7 federal agencies have additional authorities which may be available to address other potential impacts of  
8 pumping and water diversion within Reaches 3 and 4 of the Ventura River. In declining to adopt its draft  
9 TMDLs, in its June 28 letter EPA stated:

10 The [Ventura River Algae TMDL] address[es] the same beneficial uses as USEPA's draft  
11 TMDLs, identif[ies] the same stressors as USEPA's draft TMDLs, [was] developed with  
12 reference to the existing hydrological conditions in the watershed, including pumping and water  
13 diversion activities, and provide the same nutrient loading capacities. The State's TMDLs also  
14 apply throughout the Ventura River, its estuary, and all tributaries. USEPA finds that the State's  
15 TMDLs provide equivalent protection of water quality in Reaches 3 and 4 of the Ventura River  
16 as USEPA's proposed TMDLs. Therefore, USEPA is not establishing separate TMDLs to  
17 address the pumping and water diversion impairment listings.

18 88. In its June 28 letter, EPA also stated:

19 USEPA agrees that establishment of TMDLs would not adequately address all aquatic impacts  
20 that are related to pumping, diversions and flows in the Ventura River. However,  
21 recommendations for flow recovery efforts are not within the scope of USEPA's TMDL  
22 analysis, or our determination that separate TMDLs are not necessary for Reaches 3 and 4 at this  
23 time. ... USEPA supports further efforts by the Ventura River stakeholders to comprehensively  
24 assess the impacts of pumping and diversion activities and address its detrimental impacts.

#### 25 **D. The Development of California's 2014/2016 Integrated Report**

26 89. On February 8, 2017, the Los Angeles RWQCB released a draft 303(d) list and 305(b)  
27 report for waterways within its region, which includes the Ventura River (Los Angeles Draft Staff  
28 Report).

29 90. In the Los Angeles Draft Staff Report, the Los Angeles RWQCB proposed to eliminate  
30 the pumping impairment for Reach 3 of the Ventura River from the 303(d) list, among other things.

31 91. On March 30, 2017, SBCK, among others, submitted public comments on the Los  
32 Angeles Draft Staff Report. With its March 30 comments to the Los Angeles RWQCB on the Los  
33 Angeles Draft Staff Report, Channelkeeper attached and incorporated its prior comments submitted to

1 the State Board dated February 5, 2015.

2 92. The Los Angeles RWQCB responded to the public comments submitted on the Los  
3 Angeles Draft Staff Report.

4 93. On May 4, 2017, the Los Angeles RWQCB held a public workshop, but did not adopt its  
5 regional 303(d) list and 305(b) report for waterways within its region. Instead, the Los Angeles RWQCB  
6 submitted the draft list and report to the State Board for final adoption.

7 94. On June 9, 2017, the Regional Board revised its responses to public comments submitted  
8 on the Los Angeles Draft Staff Report.

9 95. On June 9, 2017, the State Board released a draft of California's 2014/2016 Integrated  
10 Report for public review and comment.

11 96. In the draft of California's 2014/2016 Integrated Report released on June 9, broadening  
12 the Regional Board's proposed delisting, the State Board proposed to eliminate the pumping and  
13 diversion impairments for Reaches 3 and 4 of the Ventura River from the 303(d) list, among other  
14 things.

15 97. On July 10, 2017, SBCK, among others such as the City, submitted written comments to  
16 the State Board on California's 2014/2016 Integrated Report. With its July 10 comments to the State  
17 Board on California's 2014/2016 Integrated Report, Channelkeeper attached and incorporated its prior  
18 comments submitted to the State Board dated February 5, 2015.

19 98. On September 22, 2017, the State Board publicly posted its response to public comments,  
20 and did not revise the draft 2014/2016 Integrated Report to address SBCK's comments.

21 99. On October 3, 2017, the State Board held a public hearing on California's 2014/2016  
22 Integrated Report.

23 100. On October 13, 2017, the State Board made the final version of California's 2014/2016  
24 Integrated Report publicly available.

25 **E. Channelkeeper's Comments on California's 2014/2016 Integrated Report**

26 101. In its March 30 comments to the Los Angeles RWQCB on the Los Angeles Draft Staff  
27 Report, Channelkeeper commented that the draft staff report was inconsistent with sections 303(d) and  
28 305(b) of the Clean Water Act because it is based on data submitted in 2010 and will not be finalized



1 until the middle of 2017.

2 102. In its March 30 comments to the Regional Board on the Los Angeles Draft Staff Report,  
3 Channelkeeper commented that the draft staff report was inconsistent with sections 303(d) and 305(b) of  
4 the Clean Water Act because it did not include an assessment of Category 4C impairments.

5 103. In its March 30 comments to the Los Angeles RWQCB on the Los Angeles Draft Staff  
6 Report, Channelkeeper commented that the draft staff report was inconsistent with sections 303(d) and  
7 305(b) of the Clean Water Act because it proposed to delist Reach 3 of the Ventura River for the  
8 existing pumping impairment.

9 104. With its March 30 comments to the Los Angeles RWQCB on the Los Angeles Draft Staff  
10 Report, Channelkeeper attached updated quality data from 2013 to 2016 that supports the existing  
11 listings for pumping and diversions in Reaches 3 and 4 of the Ventura River.

12 **F. The Los Angeles RWQCB's Responses to Channelkeeper's Comments**

13 105. In response to Channelkeeper's comment that the Los Angeles Draft Staff Report  
14 improperly relied only on data submitted through 2010, the Los Angeles RWQCB stated, in part, that  
15 staff considered all readily available data and information in the administrative record, which was  
16 defined by the State Board as those data submitted during the 2010 public data solicitation period, which  
17 began on January 14, 2010, and concluded on August 30, 2010, and that at the direction of the State  
18 Board, staff did not include data after the 2010 solicitation period in the development of the Los Angeles  
19 Draft Staff Report.

20 106. In response to Channelkeeper's comment that the Los Angeles Draft Staff Report was  
21 inconsistent with sections 303(d) and 305(b) of the Clean Water Act because it did not include an  
22 assessment of Category 4C impairments, the Los Angeles RWQCB stated, in part, that while it may be  
23 appropriate to assess flow alteration pursuant to section 305(b) to the extent it could be used to support  
24 water quality decision-making, such a listing could not be done as part of the Los Angeles Draft Staff  
25 Report because staff does not have a consistent and transparent approach to analyzing the extent to  
26 which flow-related alterations cause or impact water quality standards.

27 107. In response to Channelkeeper's comment that the Los Angeles Draft Staff Report was  
28 inconsistent with sections 303(d) and 305(b) of the Clean Water Act because it proposed to delist Reach

1 3 of the Ventura River for the existing pumping impairment, the Los Angeles RWQCB stated, in part,  
2 that it has assigned the Ventura watershed pumping and water diversions to Category 4A, i.e., being  
3 addressed by a TMDL, and cited the EPA's letter approving the Ventura Algae TMDL as stating:  
4 "Based on EPA's approval of the State's TMDLs addressing the algae, eutrophic conditions and nutrient  
5 impairments, together with other available information regarding Reaches 3 and 4 of the Ventura River,  
6 EPA has determined that it is unnecessary at this time to establish separate actions for the pumping and  
7 water diversion in Reaches 3 and 4 of the Ventura River."

8 108. In response to Channelkeeper's comment that the Los Angeles Draft Staff Report was  
9 inconsistent with sections 303(d) and 305(b) of the Clean Water Act because it proposed to delist Reach  
10 3 of the Ventura River for the existing pumping impairment, the Los Angeles RWQCB stated, in part,  
11 that there is not clear evidence supporting the fact that beneficial uses are impaired solely due to the lack  
12 of or excess of perennial or ephemeral flows.

13 **G. Channelkeeper's Comments to the State Board on the Draft of California's 2014/2016**  
14 **Integrated Report**

15 109. In its July 10 comments to the State Board on the draft of California's 2014/2016  
16 Integrated Report, Channelkeeper commented that the draft was inconsistent with sections 303(d) and  
17 305(b) of the Clean Water Act because it relied on a misquotation and misstatement of the EPA's letter  
18 approving the Ventura Algae TMDL.

19 110. In its July 10 comments to the State Board on the draft of California's 2014/2016  
20 Integrated Report, Channelkeeper commented that the draft inappropriately and illegally failed to  
21 consistently list Reaches 3 and 4 of the Ventura River in Category 5 and/or Category 4C.

22 111. In its July 10 comments to the State Board on the draft of California's 2014/2016  
23 Integrated Report, Channelkeeper commented that the draft was internally inconsistent as to the listing  
24 decision on Reach 4 because the "Final Listing Decision" for the pumping impairment presented in the  
25 fact sheet was to *list* "pumping" on the 303(d) list, but the Los Angeles RWQCB "Decision  
26 Recommendation" stated that staff concluded this impairment should fall under Category 4C and  
27 Reach 4 of the Ventura River was not listed in Attachment D of the draft of California's 2014/2016  
28 Integrated Report which listed the Category 5 (i.e., 303(d) list) waterways.

1           112. In its July 10 comments to the State Board on the draft of California's 2014/2016  
2 Integrated Report, Channelkeeper commented that the draft was internally inconsistent because the  
3 "Final Listing Decision" for the water diversion impairment presented in the fact sheet as to Reach 4 of  
4 the Ventura River was to *list* "Water Diversion" on the 303(d) list, but the Los Angeles RWQCB  
5 "Decision Recommendation" states that staff concluded this impairment should fall under Category 4C  
6 and Reach 4 of the Ventura River was not listed in Attachment D of the draft of California's 2014/2016  
7 Integrated Report which listed the Category 5 (i.e., 303(d) list) waterways.

8           113. In its July 10 comments to the State Board on the draft of California's 2014/2016  
9 Integrated Report, Channelkeeper commented that the conclusion that the original "pumping"  
10 impairment listing for Reach 3 of the Ventura River was not based on any data was incorrect because  
11 existing, readily available data supports the listing.

12           114. In its July 10 comments to the State Board on the draft of California's 2014/2016  
13 Integrated Report, Channelkeeper commented that conclusion that the original "diversion" impairment  
14 listing for Reach 3 of the Ventura River was not based on any data was incorrect because existing,  
15 readily available data supports the listing.

16           115. In its July 10 comments to the State Board on the draft of California's 2014/2016  
17 Integrated Report, Channelkeeper commented that the draft was inconsistent with sections 303(d) and  
18 305(b) of the Clean Water Act because existing, readily available data support the pumping and  
19 diversion impairments for Reaches 3 and 4 of the Ventura River.

20           116. In its July 10 comments to the State Board on the draft of California's 2014/2016  
21 Integrated Report, Channelkeeper commented that accurately identifying the impairments to Reaches 3  
22 and 4 of the Ventura River is critical given that the State Water Board is engaged in a significant  
23 undertaking in coordination with the California Department of Fish and Wildlife (CDFW) and the Los  
24 Angeles RWQCB to study surface-groundwater interactions and to develop protective instream flow  
25 criteria which would achieve attainment of beneficial uses.

26           **H. The State Board's Responses to Channelkeeper's Comments**

27           117. In response to Channelkeeper's comment that California's draft 2014/2016 Integrated  
28 Report was inconsistent with sections 303(d) and 305(b) of the Clean Water Act because it relied on a

1 misquotation and misstatement of the EPA's letter approving the Ventura Algae TMDL, the State Board  
2 stated, in part, that the language cited by Channelkeeper is technically accurate, but that when EPA's  
3 approval letter was read in context the approval letter indicates that the State Board-adopted TMDLs  
4 address the nutrient impairments and the correlated impacts due to pumping and water diversion.

5 118. In response to Channelkeeper's comment that California's draft 2014/2016 Integrated  
6 Report was inconsistent with sections 303(d) and 305(b) of the Clean Water Act because it relied on a  
7 misquotation and misstatement of the EPA's letter approving the Ventura River Algae TMDL, the State  
8 Board stated, in part, that neither Reach 3 nor Reach 4 was being proposed for inclusion into  
9 Category 4A and that Reach 3 of the Ventura River was proposed for delisting for impairments due to  
10 pumping and water diversions, and Reach 4 of the Ventura River was proposed for placement into  
11 Category 4C.

12 119. In response to Channelkeeper's comment that California's draft 2014/2016 Integrated  
13 Report inappropriately and illegally failed to consistently list Reaches 3 and 4 of the Ventura River in  
14 Category 5 and/or Category 4C, the State Board stated, in part, that there is sufficient justification for  
15 delisting these waterbodies for pumping and water diversions because the original basis for listing was  
16 flawed.

17 120. In response to Channelkeeper's comment that California's draft 2014/2016 Integrated  
18 Report inappropriately and illegally failed to consistently list Reaches 3 and 4 of the Ventura River in  
19 Category 5 and/or Category 4C, the State Board stated, in part, that Ventura River Reach 3 and Reach 4  
20 as a whole will continue to be listed as Category 5 until all pollutant impairments have been addressed.

21 121. In response to Channelkeeper's comment that California's draft 2014/2016 Integrated  
22 Report was internally inconsistent, the State Board stated, in part, that Reach 4 of the Ventura River is  
23 impaired due to temperature, ammonia, toxicity, dissolved oxygen, pH, nitrate/nitrite, and benthic  
24 macroinvertebrate bioassessments and that those pollutant impairments correctly placed Reach 4 of the  
25 Ventura River into Category 5 as impaired by pollutants needing a TMDL.

26 122. In response to Channelkeeper's comment that California's draft 2014/2016 Integrated  
27 Report was internally inconsistent, the State Board stated, in part, that Reach 3 of the Ventura River is  
28 impaired due to mercury, toxicity, and benthic macroinvertebrate bioassessments and that those

1 pollutant impairments correctly placed Reach 3 of the Ventura River into Category 5 as impaired by  
2 pollutants needing a TMDL.

3 123. In response to Channelkeeper's comment that California's draft 2014/2016 Integrated  
4 Report was internally inconsistent, the State Board stated, in part, there was insufficient information to  
5 determine whether designated uses are not supported due to pumping in Ventura River Reach 4, that  
6 Ventura Reach 4 is impaired due to temperature, ammonia, toxicity, dissolved oxygen, pH,  
7 nitrate/nitrite, and benthic macroinvertebrate bioassessments, that until all of these pollutant  
8 impairments are delisted the waterbody as a whole will remain in Category 5, and that only after all  
9 pollutant impairments are removed can a waterbody as a whole be placed into a different category.

10 124. In response to Channelkeeper's comment that the Regional Board's conclusions that the  
11 original "pumping" and "diversion" impairment listings for Reach 3 of the Ventura River were not  
12 based on any data were incorrect because existing, readily available data support the listings, the State  
13 Board stated, in part, that there was sufficient justification for delisting these waterbodies for pumping  
14 and water diversions because the original basis for the listings was flawed.

15 125. In response to Channelkeeper's comment that California's draft 2014/2016 Integrated  
16 Report was inconsistent with sections 303(d) and 305(b) of the Clean Water Act because existing,  
17 readily available data supports the pumping and diversion impairments for Reaches 3 and 4 of the  
18 Ventura River, the State Board Stated, in part, that Channelkeeper referred to data previously submitted  
19 as part of the 2012 solicitation period which was mainly qualitative in nature and examined the impacts  
20 of flow alteration in several waterbodies across the state, that it was not clear that the waters are flow  
21 impaired because flow is variable in nature, that determining if a water is impacted due to flow  
22 alterations would require a thorough analysis of historical flow and human related impacts to a defined  
23 and expected flow, that if the flow were impacted it would then need to be determined at what level are  
24 the beneficial uses impaired beyond that naturally expected to occur in times of severe drought or storm  
25 events, and that this complex analysis is undertaken during the development of flow criteria and cannot  
26 be determined based on visual and qualitative information.

27 126. In response to Channelkeeper's comment that accurately identifying the impairments to  
28 Reaches 3 and 4 of the Ventura River is critical given that the State Water Board is engaged in a

1 significant undertaking in coordination with CDFW and the Los Angeles RWQCB to study surface-  
2 groundwater interactions and to develop protective instream flow criteria which would achieve  
3 attainment of beneficial uses, the State Board stated, in part, that the coordinated efforts will continue in  
4 order to enhance and protect beneficial use support in the Ventura River watershed.

5 **I. The City's Comments on California's Draft 2014/2016 Integrated Report and the State**  
6 **Board's Responses**

7 127. In its July 10 comments on California's draft 2014/2016 Integrated Report, the City  
8 stated its support of the proposal to delist Reach 3 of the Ventura River from the 303(d) list for  
9 "pumping" due to flaws in the original listing.

10 128. In its July 10 comments on California's draft 2014/2016 Integrated Report, the City  
11 requested that the State Board also delist Reach 4 of the Ventura River from the 303(d) list for  
12 "pumping" and "water diversions."

13 129. In its July 10 comments on California's draft 2014/2016 Integrated Report, the City  
14 stated that together the existing Ventura River Algae TMDL and the California Water Action Plan  
15 (described in more detail below) provide an alternative path to considering flow issues in the Ventura  
16 River, and that in addition to being an improper basis for a listing, the conditions of concern, if any, are  
17 already being addressed through other processes.

18 130. In its July 10 comments on California's draft 2014/2016 Integrated Report, the City  
19 requested delisting of both Reach 3 and 4 of the Ventura River from the 303(d) list for both "pumping"  
20 and "water diversions."

21 131. In response to the City's request that the State Board also delist Reach 4 of the Ventura  
22 River from the 303(d) list for "pumping" and "water diversions," the State Board stated, in part, that the  
23 waterbody-pollutant combinations of pumping and water diversion in Reach 4 of the Ventura River  
24 should be removed from the section 303(d) list due to a lack of defined methodology for determining  
25 impairment due to pollution.

26 132. In response to the City's request that the State Board also delist Reach 4 of the Ventura  
27 River from the 303(d) list for "pumping" and "water diversions," the State Board stated, in part, that the  
28 original basis for the decision cannot be determined and no new information has become available



therefore, the listing recommendation has been revised from “list” to “delist.”

**J. The State Board Prejudicially Abused Its Discretion By Eliminating the Pumping and Diversion Impairments for Reaches 3 and 4 of the Ventura River in California’s 2014/2016 Integrated Report**

133. The final version of California’s 2014/2016 Integrated Report does not identify Reaches 3 and 4 of the Ventura River in the 303(d) list, i.e., Category 5 waters.

134. The final version of California’s 2014/2016 Integrated Report does not identify Reaches 3 and 4 of the Ventura River in the 305(b) report, i.e., Category 4C waters.

135. The State Board’s responses to Channelkeeper’s comments contradict the plain language of section 303(d) and section 305(b) of the Clean Water Act.

136. The State Board’s responses to Channelkeeper’s comments contradict the plain language of Section 3 (listing criteria) of the Listing Policy.

137. Monitoring data for dissolved oxygen and temperature submitted by Channelkeeper to the State Board demonstrate that Reaches 3 and 4 meet the listing factor for exceedances of numeric water quality objectives or criteria set out in Section 3.2 of the Listing Policy.

138. Given the biological populations and communities of steelhead in Reaches 3 and 4 of the Ventura River, the listing factor set out in Section 3.9 of the Listing Policy is met as to Reaches 3 and 4 of the Ventura River.

139. Reaches 3 and 4 each meet the situation-specific weight of evidence listing factor set out in Section 3.11 of the Listing Policy. Current conditions show that Reaches 3 and 4 are impaired for flow, and that the impairment is caused by pumping and diversions. Existing and readily available information and data supporting a situation specific impairment listing is scientifically defensible and reproducible.

140. The State Board’s responses to Channelkeeper’s comments contradict the plain language of Section 4 (delisting criteria) of the Listing Policy.

141. The existing and readily available data do not demonstrate that Reaches 3 and 4 of the Ventura River meet any of the delisting factors set out in Section 4 of the Listing Policy.

142. The State Board’s responses to Channelkeeper’s comments contradict the plain language

1 of EPA guidance applicable to the State Board's adoption of California's 2014/2016 Integrated Report.

2 143. The State Board's responses to comments are incorrect. The Ventura River Algae TMDL  
3 will not address the impairments to the designated beneficial uses of Reaches 3 and 4 of the Ventura  
4 River due to pumping and diversion.

5 144. The State Board's responses to comments are incorrect. Reach 3 of the Ventura River is  
6 not listed as impaired for algae, eutrophic conditions, or nutrients in Category 5 or Category 4A on  
7 California's final 2014/2016 Integrated Report thus by its own terms California's final 2014/2016  
8 Integrated Report does not identify the Ventura River Algae TMDL as applicable to Reach 3 of the  
9 Ventura River.

10 145. The State Board's responses to comments are incorrect. Reach 4 of the Ventura River is  
11 not listed as impaired for algae, eutrophic conditions, or nutrients in Category 5 or Category 4A on  
12 California's final 2014/2016 Integrated Report thus by its own terms California's final 2014/2016  
13 Integrated Report does not identify the Ventura River Algae TMDL as applicable to Reach 4 of the  
14 Ventura River.

15 146. The State Board's responses to Channelkeeper's comments are incorrect. Reach 4 of the  
16 Ventura River is not listed in Category 5 of California's final 2014/2016 Integrated Report as impaired  
17 for ammonia, toxicity, dissolved oxygen, pH, nitrate/nitrite, or benthic macroinvertebrate  
18 bioassessments.

19 147. The State Board's responses to Channelkeeper's comments are incorrect. Reach 3 of the  
20 Ventura River not listed in Category 5 of California's final 2014/2016 Integrated Report as impaired  
21 mercury or benthic macroinvertebrate bioassessments.

22 148. The State Board's responses to comments are incorrect. The State Board need not  
23 develop a specific methodology for identifying hydrologically impaired waters. EPA guidance provide  
24 more than sufficient basis to determine whether a waterway is supporting its designated beneficial uses  
25 and thus defensibly identify hydrologically impaired waters in California's 2014/2016 Integrated Report.

26 149. The State Board's responses to comments are incorrect. The State Board need not  
27 develop instream flow criteria before it can identify hydrologically impaired waters. EPA guidance  
28 provide more than sufficient basis to determine whether a waterway is supporting its designated



1 beneficial uses and thus defensibly identify hydrologically impaired waters in California's 2014/2016  
2 Integrated Report.

3       150. The State Board's response to comments misrepresent the State's development of  
4 instream flow criteria. Pursuant to Public Resources Code section 10001, no later than January 1, 1984,  
5 CDFW was required to identify and list those streams and watercourses throughout the State for which  
6 minimum flow levels needed to be established in order to assure the continued viability of stream-  
7 related fish and wildlife resources. CDFW was then required to prepare proposed streamflow  
8 requirements, which shall be specified in terms of cubic feet of water per second, for each stream or  
9 watercourse identified pursuant to section 10001 not later than July 1, 1989. (Pub. Res. Code § 10002.)  
10 In addition, CDFW was to "initiate studies to develop proposed streamflow requirements for those  
11 streams or watercourses in each fiscal year for which funds are appropriated and shall complete studies  
12 on each stream or watercourse within three years." (Pub. Res. Code § 10004.) "It is the intent of the  
13 Legislature that the department develop a program that will initiate studies on at least 10 streams or  
14 watercourses in each fiscal year." (Id.) However, CDFW issued the initial identification list required by  
15 Public Resources Code section 10001 on August 12, 2008—twenty-four years late. And CDFW has  
16 issued only two "streamflow requirements" pursuant to Public Resources Code section 10002 (for the  
17 Big Sur River and Butte Creek). The State Board's reliance on this process to justify deferring  
18 identifying hydrologically impaired waters is an abuse of discretion because CDFW has not, and likely  
19 will not, timely develop instream flow criteria.

20       151. The State Board's response to comments misrepresent the State's development of  
21 instream flow criteria. Pursuant to Water Code section 85087, no later than December 31, 2010, the  
22 State Board was required to submit to the Legislature a prioritized schedule and estimate of costs to  
23 complete instream flow studies for the Sacramento-San Joaquin Delta and for high priority rivers and  
24 streams in the Delta watershed, not otherwise covered by Water Code section 85086, by 2012, and for  
25 all major rivers and streams outside the Sacramento River watershed by 2018. In developing this  
26 schedule, the State Board was to consult with CDFW as to the timing of its submission of  
27 recommendations for instream flow needs. In December 2010, the State Board submitted a report titled  
28 "Instream Flow Studies for the Protection of Public Trust Resources: A Prioritized Schedule and

1 Estimate of Costs” pursuant to Water Code section 85087. The State Board’s December 2010 report  
2 identified 138 rivers in California for instream flow studies, including the Ventura River as a high  
3 priority river, but did not include a schedule for completion of those studies by the 2012 and 2018  
4 statutory deadlines. Instead, the State Board concluded, “these deadlines are unrealistic.” The State  
5 Board’s reliance on this process to justify deferring identifying hydrologically impaired waters is an  
6 abuse of discretion because the State Board and CDFW have not, and likely will not, timely complete  
7 instream flow studies.

8 152. The State Board’s responses to comments are incorrect. NMFS and the City have already  
9 established relevant flow thresholds, which inform the State Board’s listing decisions on Reaches 3 and  
10 4 of the Ventura River.

11 153. The State Board’s responses to Channelkeeper’s comments are incorrect. The Water  
12 Action Plan, released by the administration of Governor Brown in January 2014, establishes a roadmap  
13 for the State’s journey towards sustainable water management. The Water Action Plan is an important  
14 policy document, but it does not replace the State Board’s existing requirements imposed by sections  
15 303(d) and 305(b) of the Clean Water Act. The State Board’s reliance on the Water Action Plan to  
16 justify delisting Reaches 3 and 4 of the Ventura River is an abuse of discretion.

17 154. The State Board’s responses to Channelkeeper’s comments are incorrect. In 2015, as part  
18 of the Water Action Plan, the Ventura River was identified as a priority stream for which the State  
19 Board and CDFW plan to develop defensible, cost-effective, and time-sensitive approaches to establish  
20 instream flows using sound science and a transparent public process. However, the State Board and  
21 CDFW are only in the preliminary stages of implementing the instream flow study plan released for  
22 public comment in January 2017. The State Board’s reliance on the Water Action Plan to justify  
23 delisting Reaches 3 and 4 of the Ventura River is an abuse of discretion because the State Board and  
24 CDFW have not, and likely will not, timely develop instream flow criteria.

25 155. The State Board’s asserted reasons do not justify its delisting Reaches 3 and 4 of the  
26 Ventura River from the 303(d) list.

27 156. The State Board’s asserted reasons do not justify its failure to include Reaches 3 and 4 of  
28 the Ventura River in the 305(b) report.

157. By failing to identify Reaches 3 and 4 of the Ventura River as impaired waterways in California's 2014/2016 Integrated Report the State Board failed to act in a manner required by law and therefore prejudicially abused its discretion.

**K. The State Board Prejudicially Abused Its Discretion By Failing to Rely on All Existing Readily Available Data, Including the 305(b) Report, in Developing California's 2014/2016 Integrated Report**

158. As confirmed in the State Board's response to comments, in developing California's 2014/2016 Integrated Report, the State Board relied on data submitted to it through August 2010.

159. Thus the State Board failed to rely on all existing and readily available data. Specifically, the State Board ignored existing and readily available data submitted to it during the public review and comment process, and ignored data from 2013 to 2016 about the status of Reaches 3 and 4 submitted by Channelkeeper.

160. According to EPA, a reasonable cut-off date for data to be considered is six to nine months. (*See* 2006 Information Concerning 2008 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions, p. 4, Env't Prot. Agency, October 12, 2006.)

161. The State Board's asserted reasons do not justify its failure to rely on all existing and readily available data.

162. By failing to rely on all existing and readily available data in developing California's 2014/2016 Integrated Report the State Board failed to act in a manner required by law and therefore prejudicially abused its discretion.

**VI. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

163. Petitioner has expressly raised the legal and factual issues outlined above at every stage of the administrative process leading up to the State Board's adoption of California's 2014/2016 Integrated Report.

164. In its response to comments, the State Board expressly responded to Petitioner's written comments.

165. Thus Petitioner has exhausted all administrative remedies.

166. In compliance with Code of Civil Procedure 388, Petitioner has provided a copy of this Petition to the San Francisco Office of the California Attorney General.

1 **FIRST CAUSE OF ACTION**

2 **Against Respondent State Water Resources Control Board**  
3 **Pursuant to California Code of Civil Procedure § 1094.5 and section 303(d) of the Clean Water**  
4 **Act Petitioner Seeks an Order Enjoining the State Board from Delisting Reaches 3 and 4 of the**  
5 **Ventura River from Category 5 in California's 2014/2016 Integrated Report.**

6 167. Petitioner incorporates each paragraph of this complaint and petition, herein.

7 168. Petitioner contends that the State Board prejudicially abused its discretion because the  
8 State Board failed to proceed in the manner required by section 303(d) of the Clean Water Act by  
9 delisting Reaches 3 and 4 of the Ventura River from Category 5 of California's 2014/2016 Integrated  
10 Report for pumping and diversion impairments.

11 169. Petitioner contends that the State Board prejudicially abused its discretion because the  
12 State Board failed to support delisting Reaches 3 and 4 of the Ventura River from Category 5 of  
13 California's 2014/2016 Integrated Report for pumping and diversion impairments with adequate  
14 findings.

15 170. Petitioner contends that the State Board prejudicially abused its discretion because  
16 delisting Reaches 3 and 4 of the Ventura River from Category 5 of California's 2014/2016 Integrated  
17 Report for pumping and diversion impairments is not supported by the findings made by the State  
18 Board.

19 171. Petitioner contends that the State Board prejudicially abused its discretion because the  
20 findings made by the State Board in delisting Reaches 3 and 4 of the Ventura River from Category 5 of  
21 California's 2014/2016 Integrated Report for pumping and diversion impairments are not supported by  
22 the evidence.

23 172. Petitioner and the public have a beneficial interest in ensuring that the State Board acts in  
24 a manner required by law prior to delisting Reaches 3 and 4 of the Ventura River from Category 5 of  
25 California's 2014/2016 Integrated Report, as water is a scarce and limited resource in this State.

26 173. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law other  
27 than the relief sought herein.

28 WHEREFORE, Petitioner prays for the relief set forth below.

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**Pursuant to California Code of Civil Procedure § 1094.5 and section 305(b) of the Clean Water Act Petitioner Seeks an Order Compelling the State Board to Identify Reaches 3 and 4 of the Ventura River in Category 4C of California's 2014/2016 Integrated Report.**

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**THIRD CAUSE OF ACTION**

**Against Respondent State Water Resources Control Board  
Pursuant to California Code of Civil Procedure § 1094.5 and sections 303(d) and 305(b) of the  
Clean Water Act Petitioner Seeks an Order Compelling the State Board to Rely on All Readily  
Available Data Before Adopting California's 2014/2016 Integrated Report.**

181. Petitioner incorporates each paragraph of this complaint and petition, herein.

182. Petitioner contends that the State Board prejudicially abused its discretion because the State Board failed to proceed in the manner required by section 303(d) of the Clean Water Act and rely on all existing and readily available data before delisting Reaches 3 and 4 of the Ventura River from Category 5 of California's 2014/2016 Integrated Report for pumping and diversion impairments.

183. Petitioner contends that the State Board prejudicially abused its discretion because the State Board failed to support its decision to delist Reaches 3 and 4 of the Ventura River from Category 5 of California's 2014/2016 Integrated Report for pumping and diversion impairments with adequate findings, as those findings do not rely on all existing and readily available data.

184. Petitioner contends that the State Board prejudicially abused its discretion because its decision to delist Reaches 3 and 4 of the Ventura River from Category 5 of California's 2014/2016 Integrated Report for pumping and diversion impairments is not supported by the findings made by the State Board, as those findings do not rely on all existing and readily available data.

185. Petitioner contends that the State Board prejudicially abused its discretion because the findings made by the State Board in deciding to delist Reaches 3 and 4 of the Ventura River from Category 5 of California's 2014/2016 Integrated Report for pumping and diversion impairments, as existing and readily available data contradict the State Board's findings.

186. Petitioner and the public have a beneficial interest in ensuring that the State Board acts in a manner required by law prior to adopting the 2014/2016 Integrated Report, as water is a scarce and limited resource in this State.

187. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law other than the relief sought herein.

WHEREFORE, Petitioner prays for the relief set forth below.

**PRAYER FOR RELIEF**

188. Petitioner therefore prays that this Court:

a. Issue a writ of mandate enjoining the State Board from delisting Reaches 3 and 4 of the Ventura River from California's 2014/2016 Integrated Report in compliance with section 303(d) of the Clean Water Act;

b. Issue a writ of mandate compelling the State Board to identify Reaches 3 and 4 of the Ventura River on California's 2014/2016 Integrated Report as required by section 305(b) of the Clean Water Act;

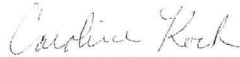
c. Issue a writ of mandate compelling the State Board to rely on all readily available data, including the information gathered pursuant to section 305(b) of the Clean Water Act, before making any listing decisions about Reaches 3 and 4 of the Ventura River in California's 2014/2016 Integrated Report;

d. Award Petitioner its costs and fees for bringing suit for the State Board's violations of State law as provided under Code of Civil Procedure section 1021.5; and/or

e. Grant such other relief as the Court deems just and proper.

Dated: November 2, 2017

Respectfully Submitted,



Caroline Koch  
LAWYERS FOR CLEAN WATER, INC.  
Attorney for Santa Barbara Channelkeeper

I, the undersigned, declare:

I am the Executive Director of Santa Barbara Channelkeeper, Petitioner in this action. I have read the foregoing petition and know its contents. The facts alleged in the above petition are within my own knowledge and I know these facts to be true.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on November 1, 2017, in Santa Barbara.

Kira Redmond  
Executive Director  
Santa Barbara Channelkeeper